UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: LOUISIANA AIR NATIONAL GUARD, 159TH FIGHTER WING
FAA Order No. 2002-23

Docket No. CP01EA0018
DMS No. FAA-2001-10081[1]

Served: November 22, 2002

DECISION AND ORDER[2]

Respondent Louisiana Air National Guard, 159th Fighter Wing ("the Guard"), appeals the order (attached) of Administrative Law Judge Burton S. Kolko assessing the Guard a $7,500 civil penalty for violating the hazardous materials regulations.[3] This decision denies the Guard's appeal and affirms the ALJ's decision.

I.

On August 17, 2000, the Guard offered Federal Express a fiberboard box for shipment to Kemron Environmental Services in Marietta, Ohio. The box had no hazardous materials labels or markings and was not accompanied by a shipper's declaration of dangerous goods as the hazardous materials regulations required.

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[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: http://dms.dot.gov.

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: http://www.faa.gov/agc/cpwebsite. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, *see* the website.

[3] For the regulations allegedly violated, *see* the Appendix.

The following day, Federal Express ground handlers in Huntington, West Virginia discovered that the box was damaged. One of the unlabeled glass containers in the box had broken, spilling its liquid contents inside the box. Federal Express contacted Complainant, and the ensuing investigation revealed that one of the glass containers contained urethane floor enamel, a flammable hazardous material. Complainant then initiated the instant civil penalty action.

In a motion to dismiss, the Guard admitted not only the factual allegations of the complaint, but also that the proposed civil penalty of $7,500 was reasonable. It argued, however, that it is not subject to civil penalties under the federal hazardous materials transportation statute and regulations because it was acting as an agency or instrumentality of the federal government when it shipped the hazardous material.

The ALJ disagreed. He found that the Guard was a state agency and denied the Guard's motion to dismiss the complaint. The ALJ further found that the Guard, by admitting the allegations and the appropriateness of the proposed sanction, had constructively withdrawn its request for hearing. The ALJ assessed the proposed $7,500 civil penalty against the Guard. On appeal, the Guard argues that the ALJ erred in finding that it was acting as an agency of the State of Louisiana.

II.

Complainant brought this case under authority of 49 U.S.C. § 5123(a), the provision in the federal hazardous materials law that provides that a "person that knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty." In 49 U.S.C. § 5102(9), the term "person":

> (A) includes a government . . . or authority of a government . . . offering hazardous material for transportation in commerce or transporting hazardous material to further a commercial enterprise; but
>
> (B) does not include –
>
> (i) . . .
>
> (ii) in section 5123 . . . of this title, a department, agency, or instrumentality of the [Federal] Government.

The parties agree that under 49 U.S.C. § 5102(9), if the Guard is a state entity, then it is subject to a civil penalty under 49 U.S.C. § 5123(a), but if it is an agency or instrumentality of the federal government, then it is not.[4]

As the ALJ correctly stated, state national guards[5] are only a potential part of the U.S. military.[6] Until activated for federal service, they are basically state entities with the state governor as their commander in chief.[7] One writer summarizes the law in the area

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[4] It is undisputed that when the drafters of 49 U.S.C. § 5102(9) capitalized the term "Government," they meant the federal government, whereas when they did not capitalize the term, they meant a state or local government.

[5] According to the U.S. Supreme Court, "[t]he National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16 of the Constitution." Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 46, *vacated on other grounds*, 382 U.S. 159 (1965).

[6] Williams v. United States, 189 F.2d 607, 608 (10th Cir. 1951); Sorrentino v. Ohio Nat'l Guard, 560 N.E.2d 186, 190 (Ohio 1990); Chapman v. Belden Corp., 414 So. 2d 1283, 1287 (La. Ct. App. 3rd Cir. 1982), *rev'd in part on other grounds*, 428 So. 2d 396 (La. 1983).

[7] Perpich v. Dep't of Defense, 496 U.S. 334, 345 (1990); Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 47, *vacated on other grounds*, 382 U.S. 159 (1965) (the governor of a state is "in charge of the National Guard . . . except when the Guard [is] called into active federal service"); Singleton v. Merit Sys. Protection Bd., 244 F.3d 1331, 1333 (Fed. Cir. 2001); ("[t]he national guard is an essential reserve component of the armed forces of the United States, available with regular forces in time of war, and on stand-by to be federalized to assist in controlling civil disorders. . . . Within each state, the national guard is a state agency, under state authority and control"); Gilbert v. United States, 165 F.3d 470, 473 (6th Cir. 1999) ("Guardsmen do not become part of the Army itself until such time as they may be ordered into active federal duty by an official acting under a grant of statutory authority from Congress"; quoting United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997)); Jones v. New York State Div. of Military and Naval Affairs, 166 F.3d 45, 47 (2nd Cir. 1998) (the New York Army National Guard is part of the militia, whose commander-in-chief is the governor; the "federal government may order the Guard into active federal duty whenever necessary, at which times [it] is a component of the United States Army under the ultimate command of the President of the United States"); Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765 (7th Cir. 1993), *cert. denied,* 510 U.S. 933

as follows:

> Although initial appearances are rather complex, the state/federal nature of the National Guard is easily understood if one grasps the basic concept: the National Guard is a state organization, and retains that character except for the times when its individual members or units are formally called to, or ordered into, federal service. Even though the Guard trains for its federal military mission, and the federal government provides pay and allowances, equipment and supplies, and related expenses, it continues to do so in its state capacity. Most importantly, the Governor continues as Commander-in-Chief.[8]

(1933) (the Wisconsin Air National Guard's use of federal rules did not change the state law character of its actions; no one was claiming that the Guard had been called into service by the federal government at the time of the challenged action; and the Guard's commander-in-chief was the governor); MacFarlane v. Grasso, 696 F.2d 217, 226 n.4 (2nd Cir. 1982) (when a state National Guard is not in the active service of the United States, it is under the governor's command); Williams v. United States, 189 F.2d 607, 608 (10th Cir. 1951) (because the Oklahoma National Guard had not been ordered into the active service of the United States, "it retained its status as a National Guard unit of the State of Oklahoma"); United States ex rel. Gillett v. Dern, 74 F.2d 485, 487 (D.C. Cir. 1934) ("except when employed in the service of the United States, the whole government of the militia is within the province of the state, and this follows because of the precise limitations of the constitutional grant); Holmes v. California Army Nat'l Guard, 920 F. Supp. 1510, 1522 (N.D. Cal. 1996), *rev'd on other grounds*, 124 F.3d 1126 (9th Cir. 1997), *reh'g and reh'g en banc denied*, 155 F.3d 1049 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999) ("when not in the active service of the United States, [national guard] units are predominantly state entities and are under the command of the governor"); Mela v. Callaway, 378 F. Supp. 25, 28 (S.D.N.Y. 1974) ("[t]he National Guard, while something of a hybrid under both state and federal control, is basically a state organization. It serves the state in time of civil emergencies within the state as well as being available for federal service during national emergencies"); Satcher v. United States, 101 F. Supp. 919 (W.D.S.C. 1952) ("National Guard Units of the various states are subject under the laws of the United States to be mustered into the Regular Army of the United States under directive of the President when Congress shall have declared a National Emergency . . . but until such assigning of a unit is ordered by the President . . . the National Guard Unit remains a component part of the State Militia and not of the Federal armed forces"); Chapman v. Belden Corp., 414 So. 2d 1283, 1287 (La. Ct. App. 3rd Cir. 1982), *rev'd in part on other grounds*, 428 So. 2d 396 (La. 1983) ("[t]he law appears well settled that members of the National Guard of the various states are state employees except when in actual service of the United States"); Williams v. Superior Court of Arizona, 494 P.2d 26, 30 (Ariz. 1972) (the Arizona National Guard, "except during wartime, is more correctly labeled an instrumentality of the State government than the federal government"); State v. Indust. Comm'n of Wisconsin, 202 N.W. 191 (Wis. 1925) ("Congress did not intend or propose to constitute the militia as a part of the federal army in times of peace. . . . The Guards are in the service of the United States when they are called forth "to execute the laws of the Union, suppress insurrections, and repel invasions" under U.S. Constitution, Article I, § 8, cl. 15).

[8] Steven B. Rich, *The National Guard, Drug Interdiction, and Counterdrug Activities and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* 1994 ARMY LAW. 35, 43.

Louisiana law expressly provides that the governor is the Guard's commander in chief except when they are called into federal service. Thus, the Louisiana Constitution provides in

The Guard argues that it was in federal service, even though it had not been formally activated, because federal funds were used for: (1) its contract with the U.S. Air Force requiring shipment of the sample; (2) the applicable environmental program; and (3) the packaging of the shipment. It further argues that federal funds would be used to pay any civil penalty assessed.[9]

Federal funding is irrelevant. The issue of whether a national guard unit is in federal service, "depends on command and control and not on whether . . . state or federal funds are being used . . . ."[10]

Article 4, § 5 as follows: "The governor shall be commander in chief of the armed forces of the state, except when they are called into service of the federal government." In addition, the Louisiana Code provides as follows: "The governor, by virtue of his office, shall be the commander in chief of the militia of the state." La. Rev. Stat. § 29:2.

[9] The Guard argues that Paragraph 5c(1) of National Guard Regulation (Air Force) 19-15, which provides as follows, authorizes the use of federal funds to pay any civil penalty assessed:

> The unit operating the facility has an immediate responsibility to operate the facility according to environmental requirements. Acting on behalf of the owner, generally the Department of the Army or the Department of the Air Force, the NGR [National Guard Bureau] has a coequal responsibility to ensure environmental compliance. The NGR will seek, in dealing with Federal and State regulators, to have these facilities treated as federally operated facilities for compliance purposes. The NGR will budget the program funds to meet environmental requirements.

Complainant counters with the argument that that the above-quoted regulation, which applies to environmental responsibilities, is inapplicable because environmental responsibilities are not the same as responsibilities under the hazardous materials regulations. Complainant also argues that the regulation provides only that the National Guard Bureau will *seek* to have the facilities treated as federally operated facilities – not that they *would* be so treated. Finally, Complainant argues that it filed its complaint against the Guard, not against the facility where it is located.

It is unnecessary to resolve the issue of whether ¶ 5c(1) of National Guard Regulation (Air Force) 19-15 authorizes the Guard to use federal funds to pay any civil penalty assessed. As stated *infra* in the text, the issue of whether a national guard is in federal service depends on command and control and not on whether federal funds are being used.

[10] Gilbert v. United States, 165 F.3d 470, 473 (6th Cir. 1999). *Id.* at 473, quoting Steven B. Rich, *The National Guard, Drug Interdiction, and Counterdrug Activities and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* 1994 ARMY LAW. 35, 40.

Cf. United States v. Orleans, 425 U.S. 807 (1976) (in determining whether an entity is a

The Guard also argues that the ALJ incorrectly relied on Williams v. United States, 189 F.2d 607 (10th Cir. 1951)[11] because it was decided prior to the passage of The National Guard Federal Technicians Act of 1968, which provides in 32 U.S.C. § 709(e) that federal technicians are employees of the United States. The Guard has stated that the individuals involved in the shipment of hazardous materials were either federal technicians or they were on active guard/reserve status. According to the Guard, if some of the individuals involved in the shipment were technicians, and if the technicians were federal employees, then the Guard must have been acting as an agency or instrumentality of the federal government.

This argument is unavailing. First, the Act made technicians "nominal federal employees" for the "very limited purpose" of affording uniform fringe and retirement benefits.[12] Benefits are not at issue here. Second, there are a number of cases decided *after* the Act's 1968 passage that have held that national guards are state entities until they are ordered into active federal service.[13]

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federal instrumentality or agency, the appropriate inquiry is not whether the entity receives federal money and must comply with federal standards and regulations, but rather whether the federal government supervises the entity's day-to-day operations). The Louisiana Air National Guard has not claimed that the federal government exercised day-to-day supervision or control over its operation.

[11] For the proposition that national guards are state entities until they are in the actual service of the United States.

[12] Am. Fed'n of Gov't Employees v. Fed. Labor Relations Auth., 730 F.2d 1534, 1536-38 (D.C. Cir. 1984) ("[n]either can national guardsmen be easily analogized to other federal employees because, except for federal benefits and tort claims coverage, it was the intent of Congress in the 1968 Technicians Act that they be the equivalent of state employees . . . .").

[13] Perpich v. Dep't of Defense, 496 U.S. 334, 345 (1990); Gilbert v. United States, 165 F.3d 470 (6th Cir. 1999); Jones v. New York State Div. of Military and Naval Affairs, 166 F.3d 45, 47 (2nd Cir. 1998); United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997); Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765 (7th Cir. 1993), *cert. denied,* 510 U.S. 933 (1933); MacFarlane v. Grasso, 696 F.2d 217, 226 n.4 (2nd Cir. 1982); Williams v. United States, 189

In conclusion, the Guard has made no claim in this case that at the time of the incident, it had been formally ordered into federal service. As a result, the ALJ correctly found that the Guard was not "a department, agency, or instrumentality of the [Federal] Government" within the meaning of 49 U.S.C. § 5102(9) of the federal hazardous materials transportation law.[14]

For the above reasons, the Guard's appeal is denied, and the ALJ's decision assessing a $7,500 civil penalty is affirmed.[15]

Marion Blakey

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 18th day of November, 2002

F.2d 607, 608 (10th Cir. 1951); Holmes v. California Army Nat'l Guard, 920 F. Supp. 1510, 1522 (N.D. Cal. 1996), *rev'd on other grounds*, 124 F.3d 1126 (9th Cir. 1997), *reh'g and reh'g en banc denied*, 155 F.3d 1049 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999); Mela v. Callaway, 378 F. Supp. 25, 28 (S.D.N.Y. 1974); Chapman v. Belden Corp., 414 So. 2d 1283, 1287 (La. Ct. App. 3rd Cir. 1982), *rev'd in part on other grounds*, 428 So. 2d 396 (La. 1983); Williams v. Superior Court of Arizona, 494 P.2d 26, 30 (Ariz. 1972).

[14] Any arguments not specifically addressed have been considered and rejected.

[15] Unless Respondent files a petition for review under 5 U.S.C. § 704 and 28 U.S.C. § 1331with an appropriate District Court of the United States, this decision shall be considered an order assessing civil penalty.

Appendix

49 C.F.R. § 171.2(a) provides as follows:

> No person may offer or accept a hazardous material for transportation in commerce unless that person is registered in conformance with subpart G of part 107 of this chapter, if applicable, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter, or an exemption, approval or registration issued under this subchapter or subchapter A of this chapter.

49 C.F.R. § 172.200(a) provides as follows:

> *Description of hazardous materials required.* Except as otherwise provided in this subpart, each person who offers a hazardous material for transportation shall describe the hazardous material on the shipping paper in the manner required by this subpart.

49 C.F.R. § 172.201(d) provides as follows:

> *Emergency response telephone number.* Except as provided in § 172.604(c), a shipping paper must contain an emergency response telephone number, as prescribed in subpart G of this part.

49 C.F.R. § 172.202(a)(1)-(5) provide, in relevant part, as follows:

> (a) The shipping description of a hazardous material on the shipping paper must include:
>
> (1) The proper shipping name prescribed for the material in column 2 of the § 172.101 table . . . ;
>
> (2) The hazard class or division prescribed for the material . . . ;
>
> (3) The identification number prescribed for the material . . . ;
>
> (4) The packing group in Roman numerals . . . ; and
>
> (5) . . . the total quantity . . . of the hazardous material . . . .

49 C.F.R. § 172.204(a) provides, in part, as follows:

> *General.* Except as provided in paragraphs (b) and (c) of this section, each person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with this subchapter by printing . . . on the shipping paper containing the required shipping description the certification contained in paragraph (a)(1) of this section or the certification (declaration) containing the language contained in paragraph (a)(2) of this section.

49 C.F.R. § 172.204(c)(2) & (3) provide, in part, as follows:

> (2) *Certificate in duplicate.* Each person who offers a hazardous material to an aircraft operator for transportation by air shall provide two copies of the certification required in this section. . . .
>
> (3) *Passenger and cargo aircraft.* Each person who offers for transportation by air a hazardous material authorized for air transportation shall add to the certification required in this section the following statement:
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> This shipment is within the limitations prescribed for passenger aircraft/cargo aircraft only (delete nonapplicable).

49 C.F.R. § 172.300(a) provides as follows:

> Each person who offers a hazardous material for transportation shall mark each package, freight container, and transport vehicle containing the hazardous material in the manner required by this subpart.

49 C.F.R. § 172.301(a) provides, in part, as follows:

> *Proper shipping name and identification number.* (1) Except as otherwise provided in this subchapter, each person who offers for transportation a hazardous material in a non-bulk packaging shall mark the package with the proper shipping name and identification number . . . .

49 C.F.R. § 172.304(a)(1) provides as follows:

> (a) The marking required in this subpart –
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> (1) Must be durable, in English and printed on or affixed to the surface of a package or on a label, tag, or sign.

49 C.F.R. § 172.400(a) provides, in part, as follows:

> Except as specified in § 172.400a, each person who offers for transportation or transports a hazardous material in any of the following packages or containment devices, shall label the package or containment device with labels specified for the material in the § 172.101 table and in this subpart . . . .

49 C.F.R. § 172.600(c) provides as follows:

> *General requirements.* No person to whom this subpart applies may offer for transportation accept for transportation, transfer, store or otherwise handle during transportation a hazardous material unless:
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> (1) Emergency response information conforming to this subpart is immediately available for use at all times the hazardous material is present; and
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> (2) Emergency response information, including the emergency response telephone number, required by this subpart is immediately available to any person

who, as a representative of a Federal, State or local government agency, responds to an incident involving a hazardous material, or is conducting an investigation which involves a hazardous material.

49 C.F.R. § 173.1(b) provides, in relevant part, as follows:

> A shipment of hazardous materials that is not prepared in accordance with this subchapter may not be offered for transportation by air, highway, rail, or water. . . .

49 C.F.R. § 173.22(a)(1) & (2) provide, in part, as follows:

> (a) Except as otherwise provided in this part, a person may offer a hazardous material for transportation in a packaging or container required by this part only in accordance with the following:
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> (1) The person shall class and describe the hazardous material in accordance with parts 172 and 173 of this subchapter, and
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> (2) The person shall determine that the packaging or container is an authorized packaging, including part 173 requirements, and that it has been [properly] manufactured, assembled, and marked . . . .

49 C.F.R. § 173.24(b)(2) provides as follows:

> (b) Each package used for the shipment of hazardous materials under this subchapter shall be designed, constructed, maintained, filled, its contents so limited, and closed, so that under conditions normally incident to transportation –
>
> . . .
>
> (2) The effectiveness of the package will not be substantially reduced . . . .

49 C.F.R. § 173.3(a) provides as follows:

> The packaging or hazardous materials for transportation by air, highway, rail, or water must be as specified in this part. . . .